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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California
 13 corporation,

14 Plaintiff,

15 v.

16 GOOGLE INC., a corporation; and
 17 DOES 1 through 100, inclusive,

18 Defendants.

19 AND CONSOLIDATED CASE.

Case No.: CV 04-9484 AHM (SHx)
 Consolidated with Case No. CV 05-4753
 AHM (SHx)

**PLAINTIFF PERFECT 10, INC.'S
 NOTICE OF MOTION AND MOTION
 FOR SUMMARY JUDGMENT AND
 SUMMARY ADJUDICATION RE:
 COPYRIGHT INFRINGEMENT
 AGAINST DEFENDANT GOOGLE,
 INC.**

BEFORE JUDGE A. HOWARD MATZ

[Filed Separately: Perfect 10's Statement of Uncontroverted Facts and Conclusions of Law; Declarations of Dr. Norman Zada, Sean Chumura, Sheena Chou, Melanie Poblete, Jeffrey Mausner, Dean Hoffman, C.J. Newton, and David O'Connor in Support of Perfect 10's Motion for Summary Judgment and Summary Adjudication; and [Proposed] Order.]

Date: August 17, 2009

Time: 10:00 a.m.

Place: Courtroom 14, Courtroom of the Honorable A. Howard Matz

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

1 To All Parties and Their Attorneys of Record:

2 Please take notice that on August 17, 2009 at 10:00 A.M, or as soon
3 thereafter as the motion may be heard, in the Courtroom of the Honorable A.
4 Howard Matz, Courtroom 14, located at 312 North Spring Street, Los
5 Angeles, California, Plaintiff Perfect 10, Inc. shall and hereby does move for
6 summary judgment and summary adjudication that Google, Inc. is
7 contributorily, directly, and vicariously liable for copyright infringement of
8 Perfect 10's images.

9 The basis for this motion is set forth in the following Memorandum of
10 Points and Authorities.

11 This motion is based upon the following pleadings, submitted herewith,
12 as well as the pleadings and other documents on file in this action, and such
13 additional pleadings, evidence, and oral argument as may be presented:

14 1. Memorandum of Points and Authorities in Support of Plaintiff
15 Perfect 10, Inc.'s Motion for Summary Judgment and Summary Adjudication
16 Re: Copyright Infringement Against Defendant Google, Inc.

17 2. Perfect 10's Statement of Uncontroverted Facts and Conclusions
18 of Law, for Motion for Summary Judgment and Summary Adjudication
19 Against Google, Inc.

20 3. Declaration of Jeffrey N. Mausner in Support of Perfect 10's
21 Motion for Summary Judgment and Summary Adjudication Against
22 Defendant Google, Inc.

23 4. Declaration of Dr. Norman Zada in Support of Perfect 10's
24 Motion for Summary Judgment and Summary Adjudication Against Google.

25 5. Declaration of Sean Chumura in Support of Perfect 10's Motion
26 for Summary Judgment Against Google.

27 6. Declaration of Sheena Chou in Support of Perfect 10's Motion for
28

1 Summary Judgment and Summary Adjudication Against Google.

2 7. Declaration of Melanie Poblete in Support of Perfect 10's Motion
3 for Summary Judgment and Summary Adjudication Against Google.

4 8. Declaration of Dean Hoffman.

5 9. Declaration of C.J. Newton.

6 10. Declaration of David O'Connor in Support of Perfect 10's
7 Motion for Summary Judgment Against Google.

8 11. [Proposed] Order Granting Perfect 10, Inc.'s Motion for
9 Summary Judgment and Summary Adjudication Against Defendant Google,
10 Inc.

11 It should be noted that Perfect 10 held off filing this motion because
12 Google filed a Motion For An Order Setting A Schedule For The Filing Of
13 Dispositive Motions. Nevertheless, Google went forward with filing three
14 Motions for Summary Judgment without waiting for the Court to rule on its
15 Motion for an Order Setting a Schedule. Perfect 10 objects to Google's
16 tactics.

17 **Statement of Local Rule 7-3 Compliance**

18 This motion is made following the conference of counsel pursuant to
19 Local Rule 7-3 which took place on April 23, 2009 and May 5, 2009.

20 Dated: July 5, 2009

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

21 By: Jeffrey N. Mausner

22 Jeffrey N. Mausner
23 Attorney for Plaintiff Perfect 10, Inc.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF PLAINTIFF PERFECT 10, INC.’S MOTION FOR**
3 **SUMMARY JUDGMENT AND SUMMARY ADJUDICATION RE:**
4 **COPYRIGHT INFRINGEMENT AGAINST DEFENDANT GOOGLE, INC.**

5 **TABLE OF CONTENTS**

6 I. INTRODUCTION AND SUMMARY OF ARGUMENT. 1

7 A. Direct Copyright Infringement. 2

8 B. Vicarious Copyright Infringement..... 2

9 C. Contributory Copyright Infringement..... 3

10 1. First and Third Prongs: Google Had Knowledge of the

11 Infringements But Failed to Take Action..... 3

12 2. Second Prong: Google Has Simple Ways To Prevent

13 Further Damage To Perfect 10’s Copyrighted Works..... 5

14 D. Google Is Ineligible For DMCA Safe Harbor, Which Is An

15 Affirmative Defense..... 5

16 II. FACTUAL BACKGROUND. 6

17 A. Perfect 10’s Business And Intellectual Property. 6

18 B. Google Provides Users With Unauthorized Access To P10

19 Images. 6

20 III. GOOGLE IS LIABLE FOR DIRECT COPYRIGHT INFRINGEMENT

21 BECAUSE IT HAS FAILED TO REMOVE 3,737 FULL-SIZE P10

22 IMAGES FROM ITS SERVERS..... 10

23 IV. GOOGLE IS LIABLE FOR VICARIOUS COPYRIGHT

24 INFRINGEMENT BECAUSE IT PLACES ADS NEXT TO

25 INFRINGING P10 IMAGES ON WEB PAGES THAT IT HOSTS. 11

26 V. INDISPUTABLE EVIDENCE ESTABLISHES THAT GOOGLE IS

27 LIABLE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT. 12

28 A. The Ninth Circuit’s Standard For Contributory Copyright

Infringement By Search Engines Such As Google..... 12

B. The Evidence Before This Court That Google Substantially

Assists Copyright Infringement Is Significantly Greater Than

The Evidence Before The Ninth Circuit. 12

C. Google Had Knowledge That Infringing Images Were Available

Using Its Search Engine, But Failed To Act..... 13

1. Google Did Not Respond At All To 14 DMCA Notices

It Received From Perfect 10 In 2001 13

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- 2. Google Took Months To Remove Identified Infringing Links From Its Web Search Results in 2004 And Failed To Remove The Same Links From Its Image Search Results. 14
 - a. The URL *web.tiscali.it/raskz/donne/guigno.htm*. 14
 - b. The URL *celebritybattles.com/celeb/Monika+Zsibrita*. 15
- 3. Google Has Not Removed Identified Infringing Links Forwarded To It By Amazon For More Than Four Years. 15
- 4. Google Has Not Removed Identified Infringing Cache Pages. 15
- 5. Google Has Not Removed Identified “See Full-Size Image Links” Despite Receiving Notices Which Followed Its Instructions. 16
- 6. Google Has Not Removed Identified Infringing In-Line Links From Its Image Search Results..... 16
- 7. Google Has Taken No Action Against Massive Infringing Advertisers, Or Even A Website Convicted Of Criminal Copyright Infringement. 16
- 8. Google Continues To Place Ads On Infringing Web Pages And Next To Identified P10 Images..... 17
- 9. Google Continues To Make And Display The Same Infringing P10 Thumbnails In Its Image Search Results. 18
- 10. Google Continues To Disseminate Perfect10.com Passwords From Its Own Website And Host And Link To Password Hacking Websites. 18
- 11. Google Continues To Provide Direct Links To Infringing Web Pages On Massive Infringing Free Websites For Which It Has Received Repeated Notice. 19
- D. Google Could Take Simple Measures To Prevent Further Damage To Perfect 10’s Copyrighted Works..... 19
- VI. GOOGLE DOES NOT QUALIFY FOR DMCA SAFE HARBOR..... 20
 - A. Perfect 10’s Notices Substantially Complied With the Requirements of the DMCA. 20
 - B. Google Has Failed to Act Expeditiously To Remove Or Disable Access To The Infringing Material. 23
 - C. Google Has Neither Adopted, Nor Reasonably Implemented, A Repeat Infringer Policy. 24
- VII. CONCLUSION. 25

TABLE OF AUTHORITIES

Cases

A & M Records, Inc. v Napster, 239 F.3d 1004, 1014 (9th Cir. 2001) 13

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 2

Perfect 10 v. Cybernet Venturers, Inc., 213 F.Supp. 2d 1146 (C.D.Cal. 2002)..... 24

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007)....passim

Statutes

17 U.S.C. § 512.....passim

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

2 Plaintiff Perfect 10, Inc. (“Perfect 10”) seeks summary judgment that
3 Defendant Google Inc. (“Google”) is liable for direct, vicarious, and contributory
4 copyright infringement of Perfect 10 copyrighted images (“P10 Images.”)

5 Google is not merely a search engine. It also hosts thousands of infringing
6 websites through its blogspot.com program, stores millions of full-size images for
7 such websites on its blogger.com servers, and acts as a commercial advertising
8 operation, placing unauthorized Google ads next to millions of infringing images
9 through its AdSense and Adwords programs.

10 Google has delayed *years* to process some Perfect 10 DMCA notices
11 (meaning to “remove, or disable access to, the material that is claimed to be
12 infringing or to be the subject of infringing activity”) and has *not processed any*
13 *portion of at least 23 Perfect 10 notices.* Declaration of Dr. Norman Zada in
14 Support of Perfect 10’s Motion for Summary Judgment (“Zada Decl.”) ¶¶15-17,
15 59- 61, Exhs. 8-10, 44-45, filed concurrently.

16 Google, a technological powerhouse, has not even taken the simplest step of
17 removing infringing images and URLs which Perfect 10 identified in its notices.
18 Zada Decl. ¶¶60-61, 67, Exhs. 44-45, 51. In addition, Google has failed to work
19 with Perfect 10 to implement a “check the infringing image” notification system,
20 as ordered by the Court. *See* Court Order of May 6, 2008, ¶9, attached as Exhibit A
21 to the Declaration of Jeffrey N. Mausner (“Mausner Decl.”), filed concurrently.
22 Such a system would have created a simple and effective procedure for removing
23 infringing material, and would have prevented Google from claiming that every
24 Perfect 10 notice is deficient. When Perfect 10 tried to follow the Court’s
25 suggestion on its own, by providing copies of infringing web pages with check
26 marks next to infringing images, Google refused to process such notices. Zada
27 Decl. ¶53, Exh. 38, pp. 7-8; Mausner Decl. Exh. B. Perfect 10’s experience with
28 Google is not unique; others who have sent DMCA notices to Google have

1 experienced a similar refusal to act. In fact, one author has described Google’s
2 DMCA policy as “*obstructionist*,” “*hopelessly broken*,” “*unnecessarily difficult*,”
3 “*legally dubious*,” and “*likely illegal*.” Dean Hoffman has stated that “*Google*
4 *was just giving me the runaround*,” “*Google operates punitively towards copyright*
5 *holders*,” and Google “*has no intent to cooperate with copyright holders*.” C.J.
6 Newton stated that ***Google did not respond to one hundred of his notices***. See
7 Declarations of Dean Hoffman and C.J. Newton, filed concurrently; Mausner Decl.
8 Exh. C.

9 **A. Direct Copyright Infringement.**

10 Google is directly liable for infringing thousands of P10 Images for at least
11 four reasons. First, Google has stored at least 3,808 *full-size* P10 Images on its
12 blogger.com servers. Even though Perfect 10 sent to Google notices that included
13 a copy of each such infringement with the full blogger.com URL, Google has not
14 removed any of those images expeditiously and has belatedly removed at most 71
15 infringements out of 3,808. Second, Google has also stored full-size P10 Images
16 on its Google Groups servers, and has not expeditiously removed any of those
17 images either. Third, Google has hosted at least 400 blogspot.com sites that have
18 infringed, in total, at least 11,000 P10 Images. Fourth, Google does not keep track
19 of the identities of its hosting clients and thus allows them to infringe
20 anonymously. Because Google is listed by Internet Registrars as the registered
21 *owner and contact* for such infringing websites, it must take responsibility when
22 put on notice. Zada Decl. ¶¶8-9, 40-52, Exhs. 1-2, 27-36, 9; Declaration of
23 Sheena Chou (“Chou Decl.”) ¶8. [*see* Section III, below].

24 **B. Vicarious Copyright Infringement.**

25 Google’s activities satisfy the requirements for vicarious copyright
26 infringement under the test established by the Supreme Court in *Metro-Goldwyn-*
27 *Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), because it profits from
28 direct infringement while declining to exercise a right to stop or limit it. Google

1 has hosted at least 4,000 P10 Images via its blogspot.com program, around which
2 it has placed Google ads. Google receives a direct benefit from the infringement,
3 because each time a user clicks on an ad near a P10 Image, Google receives a
4 payment. Google has the right and ability to control such infringement, because it
5 is occurring on Google’s own servers, which Google controls. Moreover, because
6 Google conceals the identity of its hosting clients, there is no one else other than
7 Google that copyright holders can hold responsible. Zada Decl. ¶¶6-12, Exhs. 1-5
8 [see Section IV, below].

9 **C. Contributory Copyright Infringement.**

10 The Ninth Circuit held in this very case that “Google could be held
11 contributorily liable if it had knowledge that infringing Perfect 10 images were
12 available using its search engine, could take simple measures to prevent further
13 damage to Perfect 10’s copyrighted works, and failed to take such steps.” *Perfect*
14 *10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). Google
15 satisfies the Ninth Circuit test for the following reasons [see Section V, below].

16 **1. First and Third Prongs: Google Had Knowledge of the**
17 **Infringements But Failed to Take Action.**

18 Perfect 10 sent to Google at least 14 notices in 2001 for which Google
19 admittedly took no action and must have liability, based on the Ninth Circuit test.
20 In fact, Google has produced no documents demonstrating that it took any action
21 with respect to *any notice from anyone* prior to March, 2002. Zada Decl. ¶19.

22 Since May 31, 2004, Perfect 10 has sent 56 additional separate DMCA
23 notices to Google. Forty-two of these notices were spreadsheet style notices
24 created by Perfect 10 *which followed the instructions provided by Google*. The
25 key element in such notices was the URL or link that identified the infringing web
26 page. Once Google received that URL or link, Google could simply block or
27 remove the identified infringing link from both its Web Search and its Image
28 Search results. Declaration of David O’Connor (“O’Connor Decl.”) ¶¶4-6;
Declaration of Sean Chumura (“Chumura Decl.”) ¶¶3-5 . Nevertheless, in

1 response to such notices sent by Perfect 10 to Google from May 31, 2004 through
2 June 28, 2004, *Google waited approximately four months before removing any*
3 *identified infringing links from its Web Search results. In some cases, Google*
4 *waited as long as seventeen months. Moreover, Google failed to remove the*
5 *same infringing links from its Image Search results.* Zada Decl. ¶¶21-28, Exhs.
6 11-17, 9. In other words, even though Google belatedly removed some identified
7 infringing Web Search links, Google continued to provide those same infringing
8 links to Google users via Image Search (by in-line linking and framing). Google’s
9 removal of identified infringing Web Search links demonstrates that it had
10 knowledge, satisfying the first prong of the Ninth Circuit test. However, Google’s
11 long delay (3 to 17 months) in removing such Web Search links, and its complete
12 failure to remove those same links from Image Search results, satisfies the third
13 prong of the Ninth Circuit’s test. Zada Decl. ¶¶62-63, 21-28, Exhs. 46-47, 11-17.

14 Second, the DMCA notices sent by Perfect 10 to Google from June 28, 2007
15 onwards, included both the URL required by Google and a copy of the infringing
16 web page. Those notices identified thousands of infringing URLs and images
17 which Google refused to remove or block, claiming that all such notices were
18 deficient. However, in June 2009, Google finally processed three similar notices,
19 showing that they were, in fact, not deficient. Zada Decl. ¶¶38-61, 26-28, Exhs.
20 26-45, 14-17. *See also*, Pallas Depo., 145:6-146:10; 148:23-149:7; 66:1-10; 67:12-
21 21, attached as Exh. G (filed under seal) to Mausner Decl. In some cases, Perfect
22 10 went so far as to provide Google with a copy of the Google P10 thumbnail as
23 well as three associated links – the “See full-size image” link, Web Page link, and
24 thumbnail link, using a “check the infringing image” program similar to that
25 suggested by the Court in its May 8, 2006 Preliminary Injunction order.
26 Nevertheless, Google claimed those notices were “deficient” as well. Microsoft,
27 however, processed such notices. Zada Decl. ¶53, Exh. 38, pages 7-8.

28 Third, Google has taken no action against its advertising affiliates such as

1 giganews.com, despite receiving thousands of images from Perfect 10 allegedly
2 infringed by that web site. The operators of a website similar to giganews.com,
3 thepiratebay.org, were recently convicted of criminal copyright infringement in
4 Sweden and sentenced to a year in jail. Nevertheless, Google continued to provide
5 as many as 8.8 million links to thepiratebay.org after that conviction, and
6 continued to copy P10 Images made available on thepiratebay.org into Google’s
7 Image Search results. Zada Decl. ¶14, Exh. 7.

8 Fourth, many of the images that Google uses in its Image Search results
9 display Perfect 10 copyright notices and have been the subject of multiple notices.
10 Nevertheless, Google continues to make copies of the same images, display them
11 in its Image Search results, and in-line link them to larger infringing P10 Images.
12 Google also continues to place Google ads next to such images. Zada Decl. ¶¶58-
13 60, Exhs. 43-44, 9.

14 Fifth, Google could remove virtually all P10 Images from its Image Search
15 and Web Search results using Image Recognition technology but has refused to do
16 so. Zada Decl. ¶67, Exh. 51.

17 **2. Second Prong: Google Has Simple Ways To Prevent**
18 **Further Damage To Perfect 10’s Copyrighted Works.**

19 There is no genuine issue of material fact that Google “could take simple
20 measures to prevent further damage to Perfect 10’s copyrighted works.” *See*
21 *Perfect 10 v. Amazon.com*, 508 F.3d at 1172. Google could remove identified
22 infringing links upon notice. Google could maintain a DMCA log and act against
23 repeat infringers. Google could treat massive infringers of intellectual property in
24 the same way it allegedly treats child porn sites – it cuts all links to them. Instead,
25 Google has done next to nothing. [*see* Section V.D, below].

26 **D. Google Is Ineligible For DMCA Safe Harbor, Which Is An**
27 **Affirmative Defense.**

28 Google cannot rely upon any of the safe harbor defenses for service
providers set forth in Section 512 of the DMCA, for at least five reasons. First,

1 Google has not acted expeditiously in response to Perfect 10's notices. Second,
2 Google has admitted that the websites it hosts are account holders for the purposes
3 of the DMCA. However, Google has not terminated its hosting of these websites,
4 even after repeated notices of infringement, nor does Google even know, in many
5 cases, who is operating these infringing websites. Third, Google has not acted at
6 all with respect to its massive infringing paysite advertisers, or its massive
7 infringing AdSense affiliates, which it also describes as account holders. Fourth,
8 Google has not maintained a DMCA log in a manner that allows it to prove either
9 that it expeditiously disabled access to infringing material or that it suitably
10 terminated repeat infringers. Zada Decl. ¶¶8-60, Exhs. 1-44. Finally, Google has
11 not responded expeditiously to a number of other copyright holders' notices as
12 well. *See*, Mausner Decl. Exh. C; Declarations of Dean Hoffman and C.J. Newton.

13 **II. FACTUAL BACKGROUND.**

14 **A. Perfect 10's Business And Intellectual Property.**

15 Perfect 10 owns the copyrights for all of the P10 Images described in this
16 Motion, including the 12 images Perfect 10 selected as a sample (the "Sample").
17 Zada Decl. ¶¶1-2, Exh. 9; Declaration of Melanie Poblete ("Poblete Decl.").

18 After losing more than \$50 million because of rampant infringement, Perfect
19 10 was forced to close its magazine in June, 2007, lay off most of its employees,
20 and end most of its operations. It still operates *perfect10.com* and sells back issues
21 of its magazine. Zada Decl. ¶5.

22 **B. Google Provides Users With Unauthorized Access To P10 Images.**

23 Google owns and operates the website *google.com*. It also operates the
24 websites *blogspot.com* and *blogger.com*, which it uses to host third-party websites
25 and store their images. Google has provided visitors to its websites with
26 unauthorized access to P10 Images in at least thirteen different ways, each of
27 which siphons customers away from P10 to Google and its infringing affiliates:

- 28 1) Google has stored at least 3,808 full-size P10 Images on its *blogger.com*

1 servers, along with 3,808 medium-sized versions of the same images. Google’s
2 blogger.com servers also store tens of thousands of full-size celebrity images,
3 worth tens of millions of dollars. Chou Decl. ¶8, Exh. 9; Zada Decl. ¶49.

4 2) Google has hosted more than *four hundred* websites in its blogspot.com
5 program that have infringed, in total, more than 11,000 P10 Images. Google’s
6 blogspot.com hosting program ***completely conceals the identity of the webmaster.***
7 A “who is” search on a blogspot.com hosted website shows the name of the owner
8 of the website as “Google,” not the webmaster. Google has complete control over
9 blogspot.com hosted sites and can and has removed such websites from its servers.
10 Zada Decl. ¶¶8-9, 40-51, Exhs. 1-2, 27-35, 9.

11 3) Through its AdSense advertising program, Google has placed
12 unauthorized ads next to at least *18,000* infringing P10 Images, as well as hundreds
13 of thousands of other celebrity images. Google has also placed ads on
14 blogspot.com websites that it hosts that have infringed at least 4,000 P10 Images.
15 Effectively, Google has monetized billions of dollars of intellectual property
16 without permission. Zada Decl. ¶58, Exh. 43.

17 4) Google has hosted websites which offer links to the website
18 *rapidshare.com*. Google has also powered rapidshare.com search engines.
19 Rapidshare.com is the twelfth most visited website on the Internet and one of the
20 world’s greatest thieves of intellectual property. It allows users to find and
21 download billions of dollars of full-length movies and songs, as well as thousands
22 of P10 Images. As an article from the website *whatisrapidshare.com* states,
23 “Every game, every program/application, *every movie, every song*, every e-book,
24 literally anything that can be stored on a hard drive, you can find on Rapidshare
25 servers.” (emphasis added). In fact, *rapidshare.com*’s predecessor,
26 *rapidshare.de*, “was banned by AdSense since it was primarily used for sharing
27 bulk of illegal content, including warez, pirated movies, MP3 songs, etc... Now
28 that Rapidshare.de has moved to Rapidshare.com, this new domain is already

1 qualified to show Ads by Google.” Zada Decl. ¶14, Exh. 7.

2 Perfect 10 has sent DMCA notices to Google that have identified at least
3 26,000 distinct P10 Images infringed by rapidshare.com. Nevertheless, Google
4 continues to: (i) power rapidshare.com search engines; (ii) host websites that offer
5 links to rapidshare.com and that permit the illegal downloading of thousands of
6 P10 Images; and (iii) place ads on websites that promote rapidshare.com. Zada
7 Decl. ¶14, Exh. 7.

8 5) Google also promotes other massive infringers. After the operators of
9 the website thepiratebay.org were sentenced to one year in jail for copyright
10 infringement, Google continued to provide as many as 8.8 million links to
11 thepiratebay.org. Zada Decl. ¶14, Exh. 7. Despite repeated notice, Google
12 continues to: (i) distribute ads for; (ii) provide premium search result placement
13 (Sponsored Links) to; and (iii) provide thousands of regular search result links to,
14 at least 20 pay websites, each of which has offered, on average, more than 15,000
15 pirated P10 Images on its site. Google has also distributed ads on behalf of these
16 infringing websites to other websites. These infringing websites typically charge
17 users a monthly fee of between \$10 and \$20, and then allow users to illegally
18 download massive quantities of infringing material, including thousands of full-
19 length movies, songs, and images. Perfect 10 cannot possibly compete with these
20 thieves, who offer billions of dollars of stolen content (including most of P10’s
21 library of images) for fractions of a penny on the dollar. Zada Decl. ¶¶34-37,
22 Exhs. 22-25.

23 6) Google has displayed at least 20,000 P10 Images in its Image Search
24 results. Google has also in-line linked those images to infringing third party
25 websites, thereby using P10 Images to promote the websites of the very
26 competitors of Perfect 10 who stole those P10 Images. Zada Decl. ¶53.

27 7) Google has offered to its users thousands of full-size P10 Images via its
28 “See full-size image” links, and via its in-line links. Zada Decl. ¶55.

1 8) Google has itself displayed passwords for perfect10.com and has hosted
2 websites which display perfect10.com passwords. Such passwords have allowed
3 the unauthorized downloading of at least 3,000,000 P10 Images from
4 perfect10.com. Google has also linked to password hacking websites which offer
5 such passwords. Perfect 10's evidence shows that users have gone to google.com,
6 searched on google.com for perfect10.com passwords, and then entered
7 perfect10.com using such passwords. Zada Decl. ¶65, Exh. 49.

8 9) Google has partnered with hundreds of infringing websites, including
9 imagevenue.com and imagerise.com, to share revenues from clicks on
10 Google ads placed next to P10 Images, without asking Perfect 10 for permission to
11 use such images or offering to pay Perfect 10 anything. Zada Decl. ¶13.

12 10) Google has provided thousands of links to massive infringers of P10
13 Images via its Google Web Search results. Zada Decl. ¶57, Exh. 42.

14 11) Google has allowed users to retrieve P10 Images from infringing
15 websites, even when those websites are no longer functioning, via Google's cache
16 link. Zada Decl. ¶39, Exh. 16.

17 12) Google has specially formatted P10 images so they could be
18 downloaded on cell phones. *Id.* ¶53.

19 13) Finally, Google has "arranged" its Web Search results on the names of
20 Perfect 10 models so that the search results favor infringing websites that are
21 Google advertising affiliates. For example, on October 31, 2008, Perfect 10
22 conducted a Google Web Search on "Jamike Hansen," a model exclusive to Perfect
23 10. Of the 113 Google results, *all* linked to infringing websites. Fifty-five results
24 linked to *gadissexybugil.blogspot.com*, a Google-hosted website that infringes P10
25 Images and displays Google ads. Seven results linked to the website *dignow.com*,
26 which also displays Google ads and which promotes *gadissexybugil.blogspot.com*.
27 Thirty-four results linked to *rapidlibrary.com*, a former Google AdSense website
28 which provides rapidshare.com links for downloading thousands of P10 Images.

1 All of the other search results either displayed P10 Images by in-line linking to
2 imagerise.com or imagevenue.com, both massive infringers and Google AdSense
3 affiliates, or offered rapidshare.com links for downloading P10 Images. None of
4 the results linked to a website owned or controlled by Perfect 10. Zada Decl. ¶69,
5 Exh. 9.

6 **III. GOOGLE IS LIABLE FOR DIRECT COPYRIGHT**
7 **INFRINGEMENT BECAUSE IT HAS FAILED TO REMOVE 3,737**
8 **FULL-SIZE P10 IMAGES FROM ITS SERVERS.**

9 Google is liable for direct copyright infringement for several reasons. First,
10 Google has continued to store more than 3,737 full-size P10 Images on its
11 blogger.com servers, despite repeated notice. Since approximately July 2, 2007,
12 Perfect 10 has sent DMCA notices to Google that identified approximately 3,808
13 copies of medium-size P10 Images found on blogspot.com web pages hosted by
14 Google, as well as the corresponding full-size P10 Images stored by Google on its
15 blogger.com servers. Chou Decl. ¶8; Zada Decl. ¶50. Perfect 10's DMCA notices
16 provided Google with the full URL of the infringing web pages on which the P10
17 Images resided, as well as copies of those web pages. Perfect 10 also provided
18 Google with copies of 50 full-size P10 Images stored on Google's blogger.com
19 servers (that had been identified in prior DMCA notices) as part of Perfect 10's
20 June 12, 2008 Motion to Amend its Complaint. Zada Decl. ¶¶40-51, Exhs. 27-35, 9.

21 Despite such notice, Google continues to store on its blogger.com servers,
22 and display to its users, all but approximately 71 of the 3808 full-size P10 Images
23 identified by Perfect 10. Images that were removed were only removed after many
24 months. Chou Decl. ¶8, Exh. 9. Even when Google removed all infringing
25 medium-size P10 Images from a blogspot.com hosted site, it usually left all the
26 related full-size P10 Images on its blogger.com servers. Also, because Google in
27 many cases provides an *infinite number* of URLs for each blogger.com image it
28 stores, Google's removal of an image from one URL accomplishes nothing,

1 because Google continues to make the same infringing image available at many
2 other blogger.com URLs. Zada Decl. ¶51, Exh. 35.

3 Google has also stored full-size P10 Images on its Google Groups servers,
4 which it has not removed expeditiously upon notice. Zada Decl. ¶52, Exh. 36.

5 Finally, Google is also liable for direct infringement with respect to the
6 medium-size P10 Images hosted by Google on its blogspot.com program. As
7 explained in greater detail in the Zada Declaration, Google does not require
8 websites that are hosted by Google to separately register with an Internet registrar
9 such as Network Solutions or to even identify themselves to Google. As a result of
10 Google’s anonymous hosting policy, Google is the only entity to hold liable for the
11 infringement that is taking place on its servers. Zada Decl. ¶¶6-9, Exhs. 1-2.

12 **IV. GOOGLE IS LIABLE FOR VICARIOUS COPYRIGHT**
13 **INFRINGEMENT BECAUSE IT PLACES ADS NEXT TO**
14 **INFRINGING P10 IMAGES ON WEB PAGES THAT IT HOSTS.**

15 The Supreme Court held in *Grokster* that one “infringes vicariously by
16 profiting from direct infringement while declining to exercise a right to stop or
17 limit it.” *Grokster, Ltd.*, 545 U.S. at 930. Google satisfies the *Grokster* test.

18 First, Google profits from direct infringement because it has placed “ads by
19 Google” next to more than 4,000 P10 Images on Google-hosted blogspot.com
20 websites. Google makes money each time a user clicks on one of those ads. Zada
21 Decl. ¶¶8-9, 12, 40-51, 59-60, Exhs. 1-2, 27-35, 44, 9. Second, because the
22 infringement is occurring on Google’s own servers, it has the right and ability to
23 stop such infringement, as well as the contractual right. Zada Decl. ¶¶8, 9, Exhs.
24 1-2. Because Google earns a financial benefit from infringing activity on its own
25 servers, over which Google has complete control, Google’s conduct constitutes
26 vicarious infringement under the *Grokster* standard.

27 //////////////

28 //////////////

1 **V. INDISPUTABLE EVIDENCE ESTABLISHES THAT GOOGLE IS**
2 **LIABLE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT.**

3 **A. The Ninth Circuit’s Standard For Contributory Copyright**
4 **Infringement By Search Engines Such As Google.**

5 In its opinion on Perfect 10’s motion for preliminary injunction in this very
6 case, the Ninth Circuit held as follows:

7 There is no dispute that Google substantially assists websites to
8 distribute their infringing copies to a worldwide market and assists a
9 worldwide audience of users to access infringing materials. We cannot
10 discount the effect of such a service on copyright owners, even though
11 Google's assistance is available to all websites, not just infringing ones.
*Applying our test, Google could be held contributorily liable if it had
knowledge that infringing Perfect 10 images were available using its
search engine, could take simple measures to prevent further damage
to Perfect 10's copyrighted works, and failed to take such steps.*

12 *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d at 1172 (emphasis added). The evidence
13 submitted by Perfect 10, discussed below, satisfies the Ninth Circuit’s test.

14 **B. The Evidence Before This Court That Google Substantially**
15 **Assists Copyright Infringement Is Significantly Greater Than The**
16 **Evidence Before The Ninth Circuit.**

17 In its ruling on Perfect 10’s motion for preliminary injunction, the Ninth
18 Circuit held that there is no dispute “that Google substantially assists” websites to
19 distribute infringing materials and users to access these materials. The evidence
20 before this Court that Google substantially assists infringement, discussed in
21 greater detail in the Zada Declaration, is now much stronger.

22 When the Ninth Circuit issued its ruling in 2007, it did not have before it the
23 following additional evidence of Google’s “substantial assistance:” (i) Google
24 stores thousands of full-size P10 Images on its blogger.com servers; (ii) Google
25 hosts websites that infringe thousands of P10 Images and places ads around many
26 of those images; (iii) Google powers search engines, like Rapidshare searcher, that
27 search specifically for rapidshare.com links. Such links allow users to download at
28 least 26,000 P10 Images, along with thousands of pirated movies and songs;

1 (iv) millions of P10 Images are being viewed and downloaded on infringing
2 websites to which Google links; and (v) confidential usernames and passwords
3 disseminated by Google have been used to illegally download over 3 million P10
4 Images over a fifteen-month period. Zada Decl. ¶¶65-66, 40-51, 14, Exhs. 49-50,
5 27-35, 7, 9.¹ In sum, the evidence before this Court that Google substantially
6 contributes to the infringement of P10 Images is much stronger than it was when
7 the Ninth Circuit made that same ruling.

8 **C. Google Had Knowledge That Infringing Images Were Available**
9 **Using Its Search Engine, But Failed To Act.**

10 The Ninth Circuit has held that Google may be held contributorily liable if
11 it: (i) had knowledge that infringing Perfect 10 images were available using its
12 search engine; (ii) could take simple measures to prevent further damage to Perfect
13 10's copyrighted works; and (iii) failed to take such steps. The following are
14 examples of Google's knowledge and failure to act (each using one or more images
15 from Perfect 10's sample of twelve images), which satisfy the first and third
16 prongs of the Ninth Circuit's test.

17 **1. Google Did Not Respond At All To 14 DMCA Notices It**
18 **Received From Perfect 10 In 2001**

19 Google concedes that it did nothing in response to Perfect 10's 2001 notices.
20 Furthermore, Google did not suggest that any of those 14 notices were deficient.
21 Because the URL *celebritypictures.com/MayaRubin/maya1.htm*, identified in one

22 ¹ Such illegal downloading violates Perfect 10's exclusive rights to
23 reproduce and distribute its copyrighted photographs, pursuant to Sections 106(1)
24 and (3) of the Copyright Act. *See, e.g., A & M Records, Inc. v Napster*, 239 F.3d
25 1004, 1014 (9th Cir. 2001) ("Napster users who download files containing
26 copyrighted music violate plaintiffs' reproduction rights."). Indeed, the Copyright
27 Office has unequivocally stated that downloading infringing content violates a
28 copyright owner's exclusive rights to reproduce and distribute the works. *See*
"Copyright and Digital Files," available at <http://www.copyright.gov/help/faq/faq-digital.html#p2p> ("Uploading or downloading works protected by copyright
without the authority of the copyright owner is an infringement of the copyright
owner's exclusive rights of reproduction and/or distribution."). People who use
unauthorized passwords to enter perfect10.com to download images know or
should know that they are infringing copyright, just as users of Napster did.

1 of Perfect 10's 2001 notices, was still available in Google's search results in 2004,
2 Google is liable for its inaction under the 9th Circuit test. Zada Decl. ¶16, Exh. 8.

3 **2. Google Took Months To Remove Identified Infringing Links**
4 **From Its Web Search Results in 2004 And Failed To Remove**
5 **The Same Links From Its Image Search Results.**

6 **a. The URL *web.tiscali.it/raskz/donne/guigno.htm*.**

7 Google concedes that Perfect 10 provided it with notice of the infringing
8 URL *web.tiscali.it/raskz/donne/guigno.htm*. in a DMCA notice received by Google
9 on June 28, 2004. Google further concedes that it removed this URL from its
10 Google Web Search results on October 11, 2004, about 100 days later.² Zada Decl.
11 ¶26, Exh. 14 (Macgillivray Sur-Reply Declaration). That Google was able to
12 belatedly remove this URL from its Web Search results establishes that: (i) Perfect
13 10's DMCA notice was substantially compliant; and (ii) Google had knowledge
14 that the identified web page infringed Perfect 10's copyright. Despite this
15 knowledge, however, Google continued to display P10 Images from that same
16 infringing web page and link directly to that infringing web page via its *Image*
17 *Search results*. Because Google removed direct links to the infringing web page
18 identified by Perfect 10 from its Web Search results but not from its Image Search
19 results, Google both had knowledge of infringement and failed to remove or
20 disable access to that infringement. In fact, Google continued to crawl that same
21 infringing web page, make an infringing thumbnail from the full-size P10 Image of
22 Vibe Sorenson on that page, and then provide an in-line link from that infringing
23 thumbnail to that same infringing web page, as late as July 9, 2006, *more than two*

24 ² That Google took more than three months to remove the infringing URL
25 also is a violation of the DMCA, which requires that the service provider
26 "responds *expeditiously* to remove, or disable access to, the material that is claimed
27 to be infringing." 17 U.S.C. §512(d)(1) and (3)(emphasis added). Yahoo! was
28 able to remove links and images from its search results within three days after
receiving similar notices from Perfect 10. Zada Decl. ¶¶62-63, Exhs. 46-47.
Moreover, Microsoft's customer satisfaction policy requires removal of
infringements within three days. Deposition of Judy Weston in the *Microsoft* case
("Weston Depo.") 33:24-34:8, attached as Exhibit D to the Mausner Decl. Taking
more than thirty times that long to act cannot be deemed "expeditious."

1 years after receiving notice. Zada Decl. ¶¶26-28, Exhs. 14-17.

2 **b. The URL *celebritybattles.com/celeb/Monika+Zsibrita***

3 Google received notice of this infringing URL from Perfect 10 on February
4 17, 2005, and removed the URL from Google Web Search results on April 29,
5 2005, more than 70 days later. Zada Decl. ¶26, Exh. 14. Once again, Google's
6 conduct establishes that Perfect 10's notice was substantially compliant and that
7 Google had knowledge that the identified web page infringed Perfect 10's
8 copyrights. Despite this knowledge, however, Google continued to display a P10
9 Image from that same infringing web page and link directly to that infringing web
10 page via its Image Search results, as late as July 9, 2006, *more than five hundred*
11 *days after receiving notice*. Zada Decl. ¶¶26-28, Exhs. 14-17. Because Google
12 belatedly removed direct links to the identified infringing web page from its Web
13 Search results but not from its Image Search results, Google both had knowledge
14 of infringement and failed to remove or disable access to that infringement.

15 **3. Google Has Not Removed Identified Infringing Links
16 Forwarded To It By Amazon For More Than Four Years.**

17 In April 2005, Amazon forwarded to Google the infringing URL
18 *monitor.hr/belle/0112/011206.htm*. This URL was among hundreds of URLs
19 included by Perfect 10 in its DMCA notices to Amazon. As of May 20, 2009,
20 *more than four years later*, Google still had not removed that URL from its Web
21 Search results. As explained in the Zada Declaration, Google could have found the
22 infringing search results associated with that URL simply by inputting the URL
23 into the Google Search box. Zada Decl. ¶¶29-31, Exhs. 18-20.

24 **4. Google Has Not Removed Identified Infringing Cache Pages.**

25 Perfect 10 included hundreds of copies of Google's infringing cache pages
26 in DMCA notices it sent to Google. These pages identified *both the infringing*
27 *Google cache link and the infringed P10 Image*. Nevertheless, Google still has not
28 removed most identified infringing cache links from its search results, after more
than 500 days. (Google finally removed a few identified cache links in June of

1 2009.) Zada Decl. ¶¶39, 59-61, Exhs. 26, 44-45, 9.

2 **5. Google Has Not Removed Identified “See Full-Size Image**
3 **Links” Despite Receiving Notices Which Followed Its**
4 **Instructions.**

5 Perfect 10 also sent DMCA notices to Google in which Perfect 10 provided
6 copies of the infringing web page obtained by a user who clicked on Google’s “See
7 Full-Size Image” link, as instructed by Google. Perfect 10 provided a copy of the
8 URL requested by Google, as well as the infringing/infringed image.

9 Nevertheless, Google has failed to remove or disable access to those links. Zada
10 Decl., ¶¶54-55, 59-60, Exhs. 39-40, 44, 9.

11 **6. Google Has Not Removed Identified Infringing In-Line**
12 **Links From Its Image Search Results.**

13 In its Motion for Preliminary Injunction, Perfect 10 submitted numerous
14 exhibits showing an infringing P10 thumbnail above a framed infringing full-size
15 P10 Image displayed in Google Image Search. These exhibits were based on prior
16 Perfect 10 DMCA notices. Nevertheless, Google failed to remove such twice-
17 identified infringing thumbnails and links, even though Perfect 10 used those very
18 examples in its preliminary injunction motion. Perfect 10 provided similar print
19 screens of infringing Google Image Search displays to Google in its 2007 and 2008
20 DMCA notices. Google did not respond to those notices either. Zada Decl. ¶¶28,
21 53, Exhs. 17, 37-38.

22 **7. Google Has Taken No Action Against Massive Infringing**
23 **Advertisers, Or Even A Website Convicted Of Criminal**
24 **Copyright Infringement.**

25 In its June 28, 2007 DMCA notice to Google, Perfect 10 included over 1.1
26 million P10 Images from 59 massive infringing paysites that Google linked to,
27 and/or received advertising payments from for special search result placement
28 (Sponsored Links).³ Perfect 10 sent additional notices to Google regarding these

³ Google refers to sponsored link advertisers as “account holders.” *See* 17 U.S.C. §512(i)(1)(A). In addition to making money from these sites by providing Sponsored Links, Google also provides thousands of free links to such infringing paysites. For example, as of October 30, 2008, Google was providing 12,200 web

1 massive infringers, including a notice dated December 8, 2005. Google has
2 recently made clear that it will not act against such massive infringers, even if they
3 pay Google for special search result placement. Mausner Decl., Exh. B; Zada
4 Decl. ¶¶32-37, Exhs. 21-25.

5 Some of Google’s paysite advertisers, such as giganews.com, are involved in
6 arguably the greatest theft of all time. They have stolen most major full length
7 movies, songs, images, and even computer software, worth tens of billions of
8 dollars. They are doing tremendous damage to the entertainment community,
9 whose livelihood depends on a vibrant market for its movies and songs. Google’s
10 willingness to partner with such criminals to help them profit from massive theft is
11 unjustifiable, morally repugnant, and should not be sanctioned by this Court.⁴
12 Google has even refused to remove links to the website piratebay.org, whose
13 owners were convicted of criminal copyright infringement in Sweden. *Id.* ¶14, Ex.7.

14 **8. Google Continues To Place Ads On Infringing Web Pages
And Next To Identified P10 Images**

15 Google has placed its advertising (“ads by google”) *next to* at least 18,000
16 P10 Images on free websites, including blogspot.com websites that it hosts. In
17 most cases, Google has not removed such ads even after receiving notice from
18 Perfect 10 that the web pages where Google placed these ads infringed upon
19 Perfect 10’s copyrights. Furthermore, even when Google has removed ads that it
20 placed next to P10 Images on certain infringing websites, Google has simply
21 placed its ads next to those same P10 Images on other infringing websites. Zada
22
23 search links to its advertising affiliate, giganews.com. *Id.* ¶¶11, 37, Exhs. 4, 25.

24 ⁴ The fact that these paysites do not have web pages that contain the
25 infringing material should not make any difference. Google provides links to the
26 home pages of these websites, including Sponsored Links and regular links, which
27 allow Google users to locate infringing materials. Perfect 10 has provided notices
28 to Google that identify “the material that is claimed to be infringing or to be the
subject of infringing activity,” as required by 17 U.S.C. §512(c)(3)(A)(ii).
Google’s insistence that Perfect 10 provide a web page URL for the infringing
material, when none exists, is simply an excuse not to act when Perfect 10 provides
the home page URL and simple instructions on how to locate the infringing
material. Zada Decl. ¶¶34-37, Exhs. 22-25.

1 Decl. ¶¶12-13, 58, Exhs. 5-6, 43.

2 **9. Google Continues To Make And Display The Same**
3 **Infringing P10 Thumbnails In Its Image Search Results.**

4 In the 68+ DMCA notices it has sent to Google, Perfect 10 has repeatedly
5 identified the same infringing P10 Images over and over. Many of these images
6 display Perfect 10 copyright notices. Nevertheless, Google continues to make
7 thumbnail copies of the same infringing P10 Images for its Image Search results,
8 and continues to link those infringing P10 thumbnails to the same full-size
9 infringing P10 Images. Although the URLs of these images may change, the
10 damage to Perfect 10 does not. Zada Decl. ¶28, Exh. 17. By continuing to provide
11 the same identified infringing P10 thumbnails to its users, and by continuing to
12 link such thumbnails to the same full-size infringing P10 Images, Google has not
13 disabled access to the identified infringing material.

14 Google has recently demonstrated that it has the ability to search for and
15 recognize similar images, through its “similar images” feature on its website.
16 Google’s failure to use such capability, as well as its failure to assign any
17 employees to locate and remove infringing images identified in Perfect 10’s
18 DMCA notices, demonstrates that Google has failed to act to prevent further
19 damage to Perfect 10’s copyrighted works, the third prong of the Ninth Circuit’s
20 test for contributory infringement. Zada Decl. ¶¶53-54, 67, Exhs. 37-38, 51.

21 **10. Google Continues To Disseminate Perfect10.com Passwords**
22 **From Its Own Website And Host And Link To Password**
23 **Hacking Websites.**

24 Google continues to display passwords to perfect10.com on its own website.
25 Moreover, Google continue to host websites on its blogspot.com servers that also
26 display P10 passwords. Such passwords have been used to illegally download
27 millions of images from perfect10.com. Furthermore, as explained in the Zada
28 Declaration, users have gone to google.com, searched for perfect10.com passwords
on google.com, and then made unauthorized downloads of P10 Images from
perfect10.com using those passwords. Zada Decl. ¶65, Exh. 49.

1 Google's dissemination of these passwords to its users materially assists
2 those users in gaining unauthorized access to the pay-only members' area of
3 Perfect 10's website, from which the users make unauthorized copies of P10
4 Images by downloading them. Google could easily limit its display of passwords
5 to perfect10.com because Perfect 10 has given notice of exactly where those
6 passwords are located in Google's search results. Furthermore, Google could
7 simply search for and delete strings of the form "username:password@
8 www.perfect10.com." Nevertheless, Google has chosen not to take any of these
9 simple measures. Zada Decl. ¶¶65, 70, Exhs. 49, 53.

10 **11. Google Continues To Provide Direct Links To Infringing**
11 **Web Pages On Massive Infringing Free Websites For**
12 **Which It Has Received Repeated Notice.**

12 Google continues to provide direct links to web pages on massive infringing
13 websites that offer, in some cases, as many as 17,000 free full-size P10 Images.
14 For example, even though Perfect 10 has sent DMCA notices to Google that
15 include copies of infringing web pages from the massive infringing websites
16 nudecelebforum.com, phun.org, and imagerise.com, Google continues to directly
17 link to those infringing web pages, both via its Web Search results and its Image
18 Search results. Zada Decl. ¶¶57-60, Exhs. 42-44, 9.

19 **D. Google Could Take Simple Measures To Prevent Further Damage**
20 **To Perfect 10's Copyrighted Works.**

21 Google could take simple measures to prevent further damage to Perfect
22 10's copyrighted works, but has failed to do so. As set forth in greater detail in the
23 Zada Declaration, Google could: (1) remove or disable access to P10 Images
24 identified in Perfect 10's DMCA notices, which are on Google's blogspot.com and
25 blogger.com servers; (2) stop providing Sponsored Links to Google advertisers that
26 infringe thousands of P10 Images; (3) stop distributing Sponsored Links for such
27 infringers on third-party websites; (4) stop placing ads on identified websites that
28 infringe P10 Images; (5) stop hosting websites that offer rapidshare.com links that

1 allow users to illegally download P10 Images; (6) stop powering search engines
2 specifically designed to search for infringing rapidshare.com links; (7) remove P10
3 thumbnails from Google's Image Search results that have been repeatedly
4 identified in Perfect 10's DMCA notices; (8) remove links in Google's Web
5 Search results that lead directly to the infringing web pages identified in Perfect
6 10's notices;⁵ (9) delete all links to websites that infringe over 1,000 P10 Images;
7 (10) send infringing images to advertisers and other massive infringers and require
8 them to remove such images or be delisted from Google search results; (11) adopt
9 and reasonably implement a policy against repeat infringers, as required under the
10 DMCA §512(i); (12) stop publishing confidential username and password
11 combinations that have facilitated widespread, unauthorized access to Perfect 10's
12 website; (13) stop hosting websites that illegally disseminate passwords to
13 perfect10.com; and (14) remove from Google search results websites that publish
14 confidential username/password combinations, as identified in Perfect 10's notices.

15 **VI. GOOGLE DOES NOT QUALIFY FOR DMCA SAFE HARBOR.**

16 In order to qualify for the safe harbor provisions of the DMCA, Google must
17 satisfy all of the relevant statutory requirements. Google's admitted many-month
18 delay in processing certain Perfect 10 notices, its complete failure to process other
19 notices, its failure to maintain a DMCA log, and its failure to keep track of its
20 hosting clients, along with other reasons discussed below, all preclude Google
21 from qualifying for the safe harbor affirmative defense.

22 **A. Perfect 10's Notices Substantially Complied With the**
23 **Requirements of the DMCA.**

24 The relevant statutory requirements for DMCA notices are set forth in 17
25 U.S.C. § 512(c)(3). The notices sent by Perfect 10 to Google substantially
26 complied with these requirements, for at least five separate reasons.

27 ⁵ Google has belatedly removed some URLs identified in Perfect 10's
28 notices, but has failed to remove thousands of other infringing URLs identified by
Perfect 10. Zada Decl. ¶¶40-61, Exhs. 27-45.

1 First, there is no dispute that Perfect 10's notices satisfied subsections (i),
2 (iv), (v), and (vi) of Section 512(c)(3) because they contained: (i) a physical or
3 electronic signature of Dr. Zada; (iv) information reasonably sufficient to permit
4 Google to contact Dr. Zada; (v) a statement that Dr. Zada, on behalf of Perfect 10,
5 had a good faith belief that use of the material in the manner complained of was
6 not authorized; and (vi) a statement that the information in each notice was
7 accurate, and under penalty of perjury, that Dr. Zada is authorized to act on behalf
8 of Perfect 10. *See* Zada Decl., ¶¶24, 34, 40, 53, 56, Exhs. 13, 22, 27, 37, 41, 9.

9 To satisfy the remaining two subsections, (ii) and (iii), Perfect 10 sent
10 notices to Google in 2004 *based on Google's own instructions*. Perfect 10
11 complied with subsection (ii) by providing: (a) the name of the model in the
12 infringed image(s) and (b) either the volume, issue, and page numbers of the
13 Perfect 10 Magazine containing those infringed images, or a reference to
14 perfect10.com sufficient to allow Google to locate those images on perfect10.com.
15 Perfect 10 offered to provide Google with a free password to perfect10.com.
16 Later, beginning in June 2007, Perfect 10 satisfied subsection (ii) by sending
17 *actual copies of the infringed/infringing images*, meticulously edited to exclude
18 non-P10 Images. Zada Decl. ¶¶22-24, 33-39, Exhs. 9, 12-13, 22-26.

19 To satisfy subsection (iii), Perfect 10 initially provided the infringing URLs
20 from Google's Web Search results, as instructed by Google. These URLs
21 appeared in green at the end of each search result. Later, starting in June 2007,
22 Perfect 10 sent Google copies, using Adobe, of the infringing web pages which
23 contained *the full URL of the infringing web page, as well as a copy of the*
24 *infringed/infringing image*. *Id.* ¶¶22-24, 33-39, Exhs. 9, 12-13, 22-26.

25 It cannot be disputed that Perfect 10's notices provided Google with
26 sufficient information to locate and remove infringing links, because Google
27 belatedly removed at least 1,000 such links from its Web Search results in response
28 to Perfect 10's spreadsheet style notices. *Id.* ¶¶26-28, 40-51, Exhs. 14-16, 27-35.

1 Furthermore, Google also belatedly processed Perfect 10's Adobe style notices
2 containing the URL and infringed/infringing images, demonstrating that those
3 notices were substantially compliant as well. Zada Decl. ¶¶59-61, Exhs. 44-45.

4 Third, Google's letters to Perfect 10 in 2004 never suggested that there were
5 any deficiencies in Perfect 10's notices. Google did in fact process a number of
6 Perfect 10's notices in June 2009.⁶ *Id.* ¶¶61, 26-28, Exhs. 45, 14-16.

7 Fourth, that Perfect 10's notices provided sufficient information for Google
8 to locate and disable access to infringing material is evidenced by the fact that
9 Yahoo! was able to remove links and images from its search results within three
10 days after receiving similar notices from Perfect 10. Yahoo! did not request
11 additional information from Perfect 10 or suggest that Perfect 10's notices were
12 deficient in any way. Zada Decl. ¶¶62-63, 46-47. Microsoft was also able to
13 process certain Perfect 10 notices that Google has refused to process. *Id.* ¶53. *See*
14 *also*, O'Connor Decl. ¶¶3-6, Exh. 1; Chumura Decl. ¶¶3-5, Exh. 1; Pallas Depo.,
15 145:6-146.10; 148:23-149:7, attached as Exh. G to Mausner Decl., filed under seal.

16 Fifth, as demonstrated in the Zada Declaration, Google could have simply
17 inputted the URLs provided by Perfect 10 into its search box to find the
18 corresponding infringing search results. Zada Decl. ¶31, Exh. 20. Google has
19 already demonstrated that it can remove URLs identified by Perfect 10. Google
20 simply failed to remove such URLs from its Image Search results, and delayed or
21 took no action whatsoever to remove such URLs from most of Google's Web
22 Search results. Zada Decl. ¶¶16-18, 26-28, 59-60, Exhs. 14-16, 44, 9.

23 Sixth, Google has stated that if a notice were deficient, Google would
24 contact the copyright holder. And, to the extent that there were any deficiencies in

25 ⁶ As noted above, Google waited four months before removing any results at
26 all, but then was able to remove at least one thousand infringing links in its Web
27 Search results, but did not remove such infringing links from its Image Search
28 results. Zada Decl. ¶¶26-28, Exhs. 14-17. Furthermore, even when Google
removed links from its Web Search results, it still published those same URLs on
Chillingeffects.org, despite Perfect 10's objections. *Id.* ¶64, Exh. 48; Declaration
of Dean Hoffman ¶¶4-9; Declaration of C.J. Newton ¶5.

1 Perfect 10’s notices, Google was required, under §512(c)(3)(B)(ii), to contact
2 Perfect 10 to cure any such deficiencies. Google not only failed to work with
3 Perfect 10 in any meaningful way, it refused repeated requests by Perfect 10
4 to provide Perfect 10 with concrete examples of compliant notices, which Perfect 10
5 could then use as a template. Zada Decl. ¶¶26, 70, Exhs. 14, 53.

6 **B. Google Has Failed to Act Expeditiously To Remove Or Disable**
7 **Access To The Infringing Material.**

8 In order to qualify for the safe harbor provisions of the DMCA, which is an
9 affirmative defense, a service provider must “act[] expeditiously to remove, or
10 disable access to, the material” that is claimed to be infringing or to be the subject
11 of infringing activity. 17 U.S.C. § 512(c) and (d). Google cannot meet this
12 requirement for multiple reasons.

13 First, as of May 18, 2009, Google has removed no more than approximately
14 71 full-size P10 Images from its blogger.com servers, even though Perfect 10
15 identified more than 3,800 infringing images in its notices. Second, Google took
16 between three and seventeen months to remove many Web Search links. Third,
17 Google completely failed to remove those same links from its Image Search
18 results. Fourth, Google has not removed or disabled access to tens of thousands of
19 infringements identified by Perfect 10’s notices, including infringing Web Search
20 links, infringing cache links, infringing “See full-size image” links, infringing P10
21 thumbnails, and infringing in-line links. Fifth, Google continues to place Google
22 ads next to P10 Images for which it has received notice. Sixth, Google continues
23 to host and link to password hacking websites and continues to display
24 perfect10.com passwords itself. Finally, Google has not even maintained a DMCA
25 log to prove that it has complied with the expeditious removal and repeat infringer
26 requirements. Such conduct establishes that Google cannot meet the requirement
27 of expeditiously removing or disabling access to infringing material. Zada Decl.
28 ¶¶8-60, Exhs. 1-44. Chou Decl.

1 **C. Google Has Neither Adopted, Nor Reasonably Implemented, A**
2 **Repeat Infringer Policy.**

3 Yet another reason that Google does not qualify for any DMCA safe harbor
4 is Google's failure to adopt and reasonably implement a repeat infringer policy, as
5 required by 17 U.S.C. §512(i)(1)(A). A repeat infringer policy is not the same as
6 a copyright policy relating to notice and take-down of infringing materials, because
7 it must deal with the infringer rather than the infringing material itself. *See Perfect*
8 *10 v. Cybernet Ventures, Inc.*, 213 F.Supp. 2d 1146 (C.D.Cal. 2002) 1177:

9 [S]ection 512(i) is focused on infringing users, whereas 512(c) is
10 focused primarily on the infringing material itself. ... The Court does
11 not read section 512 to endorse business practices that would
12 encourage content providers to turn a blind eye to the source of
13 massive copyright infringement while continuing to knowingly profit,
14 indirectly or not, from every single one of these same sources until a
court orders the provider to terminate each individual account. ...
[O]nline service providers are meant to have strong incentives to work
with copyright holders. The possible loss of the safe harbor provides
that incentive and furthers a regulatory scheme in which courts are
meant to play a secondary role to self-regulation.

15 Google has not reasonably implemented a repeat infringer policy, as shown in
16 these five ways: (1) Google admits that its blogspot.com and blogger.com clients
17 are account holders or subscribers for purposes of the DMCA. Zada Decl. ¶8, Exh.
18 1. However, Google does not keep track of the identities of many such account
19 holders. Because Google only requires an email address and password, it cannot
20 prevent an infringer from continuing to use Google's hosting services with a
21 different email address and password. *Id.* ¶6. (2) Google has failed to keep a
22 spreadsheet-type DMCA log to track repeated complaints regarding the same
23 infringer. It has also not kept track of the identities of such infringers. Zada Decl.
24 ¶19. As a result, Google does not have a mechanism for terminating repeat
25 infringers or preventing such repeat infringers from becoming account holders or
26 subscribers for its other programs. (3) Google has not prevented its blogspot.com
27 account holders from continuing to infringe P10 Images and has not removed such
28 images from its own blogger.com servers, despite repeated notice. Zada Decl.

1 ¶¶40-51, Exhs. 27-35. (4) Google has not stopped doing business with AdWords
2 and AdSense account holders who infringe P10 Images. Zada Decl. ¶¶12-14, 34-
3 37, Exhs. 5-7, 22-25. (5) Google itself is a repeat infringer, as it has continued to
4 infringe full-size P10 Images via its blogger.com program, even when it has
5 removed the corresponding blogspot.com hosted website. Zada Decl. ¶¶40-51,
6 Exhs. 27-35. Accordingly, because Google has failed to comply with the
7 requirements of the DMCA, the safe harbor protections of the statute provide no
8 basis for this Court to deny the Motion.

9 **VII. CONCLUSION.**

10 The stakes in this case are high, for both Perfect 10 and for all copyright
11 holders. Google has continued to misuse massive quantities of Perfect 10's
12 intellectual property for its own commercial gain, despite receiving more than
13 67 Perfect 10 DMCA notices, beginning in 2001. Google has allowed its
14 hosting clients to remain anonymous, leaving copyright holders with no one
15 other than Google to hold responsible. Google has failed to expeditiously
16 remove or disable most of the infringing links and images identified by Perfect
17 10 in its notices. Google has refused to process notices that can be processed,
18 and which Yahoo! and/or Microsoft have processed. Google has even refused
19 to process notices identical to others it has processed! Finally, Google has not
20 prevented further damage to thousands of Perfect 10's copyrighted works, and
21 thus is liable for contributory infringement under the test established by the
22 Ninth Circuit in this case. For all of the reasons set forth herein, Perfect 10
23 respectfully requests that this Court grant its motion for summary judgment.

24 Dated: July 5, 2009

Respectfully submitted,
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25
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